FILED
FEB 28 1985
ALEXANDER L. STEVAS
CLERK

No. 84-648

In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX CO., INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

FRANKLYN H. SNITOW
WILLIAM H. PAULEY, III
Counsel of Record
SNITOW & PAULEY
415 Madison Avenue
New York, New York 10017
(212) 486-9080
Attorneys for Petitioner

SCOTT M. YAFFE
Of Counsel

QUESTIONS PRESENTED

1. Whether a criminal conviction for 18 U.S.C. § 1961(1) (1978) predicate acts is required before a private litigant can recover civil damages under RICO?

2. Whether a showing of "mobster"-type or other distinct injury is essential before a private litigant can recover civil damages under RICO?

STATEMENT PURSUANT TO RULE 28.1

Sedima, S.P.R.L., has no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

Page

Questions Presented i

Statement Pursuant to Rule 28.1 ii

Table of Contents iii

Table of Citations iv

Opinions and Orders Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 4

Summary of Argument 8

Argument:

I. The judicially-forged prohibition against civil RICO claims absent predicate act convictions is an impermissible infringement on legislative authority. 11

A. The plain language of RICO does not require a predicate act conviction to perfect an 18 U.S.C. § 1964(c) claim. 11

B. The legislative history of RICO underscores the statute's preventive and remedial purposes and does not suggest that a criminal conviction is a condition precedent to a civil claim. 17

Contents

Page

C. Prior criminal conviction requirement — an unsound judicial engraftment. 21

D. The conviction requirement will be a *contra* force on the administration of justice. 25

II. A requirement of "mobster"-type injury for a civil RICO claim is an impermissible infringement on legislative authority. 28

A. The plain language of RICO does not require a "mobster"-type or other distinct injury in order for a civil plaintiff to have standing to sue... 28

B. RICO's legislative intent clearly supports civil suits unfettered by a person's status or affiliation. 35

C. "Mobster"-type injury requirement — an unsound judicial engraftment. 40

Conclusion 43

TABLE OF CITATIONS

Cases Cited:

Albernaz v. United States, 450 U.S. 333 (1981) 25

Alcorn County v. U.S. Interstate Supplies, 731 F. 2d 1160 (5th Cir. 1984)..... 35

Alexander Grant & Co. v. Tiffany Indus., 742 F. 2d 408 (8th Cir. 1984) 30, 35

Contents

Page

Bankers Trust v. Rhoades, 741 F. 2d 511 (2d Cir. 1984) 30

Bankers Trust v. Feldesman, 566 F. Supp. 1235 (S.D.N.Y. 1983), aff'd sub nom. Bankers Trust Co. v. Rhoades 741 F. 2d 511 (1984) 31, 33

Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983).....32, 33

Bennett v. Berg, 685 F. 2d 1053 (8th Cir. 1982), aff'd en banc, 710 F. 2d 1361 (8th Cir. 1983), cert. denied sub nom. Prudential Ins. Co. v. Bennett, 104 S. Ct. 527 (1983) 32, 35

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 31

Bruns v. Ledbetter, 583 F. Supp. 1050 (S.D. Cal. 1984) 33

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) 29, 31

Bunker Ramo Corp. v. United Business Forms, 713 F. 2d 1272 (7th Cir. 1983) 16, 32, 35

Charing Cross v. Riggs Nat'l Bank, 655 F. 2d 1257 (D.D.C. 1983) 33

Crocker Nat'l Bank v. Rockwell Intern. Corp., 555 F. Supp. 47 (N.D. Cal. 1982) 32

Contents

Page

Dakis v. Chapman, 574 F. Supp. 757 (N.D. Cal. 1983) 33

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 24

D'Iorio v. Adonizio, 554 F. Supp. 222 (M.D. Pa. 1982) ... 32

Eisenberg v. Gagnon, 564 F. Supp. 1347 (E.D. Pa. 1983) 32, 34

Erlbaum v. Erlbaum, 584 F. Supp. 908 (E.D. Pa. 1982) 31

Estee Lauder v. Harco Graphics, 558 F. Supp. 83 (S.D. N.Y. 1984) 33

Furman v. Cirrito, 578 F. Supp. 1535 (S.D.N.Y. 1984), aff'd., 741 F.2d 524 (2d Cir. 1984) 33, 34, 41

George Moore Ice Cream Co. v. Rose, 289 U.S. 373 (1933)..... 23

Gitterman v. Vitoulis, 564 F. Supp. 46 (S.D.N.Y. 1982) 32

Guerrero v. Katzen, 571 F. Supp. 714..... 32

Haroco v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F. 2d 384 (7th Cir. 1984) 12, 29, 30, 33, 34, 42

Hanna Mining Co. v. Noreen Energy Resources, 574 F. Supp. 1172 (N.D. Ohio 1982) 32

Contents

Page

Harper v. New Japan Securities Int'l, 545 F. Supp. 1002 (C.D. Cal. 1982) 33

Hellenic Lines v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981) 32

Helvering v. Mitchell, 303 U.S. 391 (1938)..... 20

Hudson v. Larouche, 579 F. Supp. 623 (S.D.N.Y. 1983) 33

Iannelli v. United States, 420 U.S. 770 (1975).....15, 16

In re Action Industries Tender Offer, 572 F. Supp. 846 (E.D. Va. 1983) 32, 33

In re Catanella & E.F. Hutton & Co., 583 F. Supp. 1388 (E.D. Pa. 1984) 32, 33

In re Longhorn Securities Litigation, 573 F. Supp. 255 (W.D. Okla. 1983) 32, 33

Kincade v. Bradshaw, 3 Hawks (N.C.) 63 (1824) 21

Kirschner v. Cable/Tel. Corp., 576 F. Supp. 234 (E.D. Pa. 1983) 33

Landmark Savings & Loan v. Rhoades, 527 F. Supp. 206 (E.D. Mich. 1981) 31, 32, 33

Laterza v. American Broadcasting Co., 581 F. Supp. 408 (S.D.N.Y. 1984) 33

Page

Lewis v. United States, 445 U.S. 55 (1980) 24

Margolis v. Republic National Bank, 585 F. Supp. 595 (S.D.N.Y. 1984) 33

Mauriber v. Shearson/American Express, 567 F. Supp. 1231 (S.D.N.Y. 1983) 32, 33

Minpeco S.A. v. Conticommodity Services, 552 F. Supp. 327 (S.D.N.Y. 1984)..... 33

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), reh'g denied, 439 U.S. 884 (1978)..... 24

Municipality of Anchorage v. Hitachi Cable, 547 F. Supp. 633 (D. Alaska 1983)..... 32

North Barrington Dev. v. Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980)..... 31

Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981)..... 25

One Assortment of 89 Firearms, 104 S. Ct. 1106.....20, 21

One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972)..... 20

Owl Construction Co. v. Ronald Adams Contractor, 727 F.2d 540 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3098 (U.S. June 11, 1984) 35

Page

Ralston v. Capper, 569 F. Supp. 1575 (E.D. Mich. 1983) 30, 32, 33

Reiter v. Sonotone Corp., 442 U.S. 330 (1979)..... 24

Richards v. United States, 369 U.S. 1 (1962)..... 13

Richardson v. Shearson/American Express Co., 573 F. Supp. 133 (S.D.N.Y. 1983)..... 33

Robinson v. California, 370 U.S. 660 (1962).....38, 39

Russello v. United States, 104 S. Ct. 296 (1983) 11, 13, 28

Scales v. United States, 367 U.S. 203 (1961) 38

Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983), cert. denied sub nom. Arthur Anderson & Co. v. Schacht, 104 S. Ct. 508 (1983).....32, 35

Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 567 F. Supp. 1146 (D.N.J. 1983), aff'd in part and rev'd in part, both on other grounds, 742 F.2d 786 (3d Cir. 1984) 33, 34

Slattery v. Costello, 586 F. Supp. 162 (D.C. Cir. 1983) 32, 33

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 24

State Farm Fire and Cas. Co. v. Estate of Caton, 540 F. Supp. 673 (D. Del. 1982) 32

Page

Sutliff v. Donovan Companies, 727 F.2d 648 (7th Cir. 1984) 35, 42

Tarrant v. Ponte, 751 F.2d 459 (1st Cir. 1985) 23

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) .. 24

TVA v. Hill, 437 U.S. 153 (1978) 24

Ullmann v. United States, 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956) 24

United States v. Apfelbaum, 445 U.S. 115 (1980) 15

United States v. Bornstein, 423 U.S. 303 (1976) 21

United States v. Braverman, 373 U.S. 405 (1963) 23

United States v. Cappetto, 501 F.2d 1351 (7th Cir. 1975), cert. denied, 420 U.S. 925 (1975) 22

United States v. Culbert, 435 U.S. 371 (1978) 35

United States v. Fabrizio, 385 U.S. 263 (1966) 35

United States v. Frumento, 563 F.2d 1083 (3rd Cir. 1977), cert. denied sub nom. Sills v. United States, 434 U.S. 1072 (1978) 22

United States v. Licavoli, 725 F.2d 1040 (6th Cir. 1984) 22

Page

United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), cert. denied sub nom. Bertolotti v. United States, 440 U.S. 962 (1979) 22

United States v. Naftalin, 441 U.S. 768 (1979) 28

United States v. One Assortment of 89 Firearms, 104 S. Ct. 1099 (1984) 20

United States v. Turkette, 452 U.S. 576 (1981) 11, 17, 23, 41, 42

United States v. Ward, 448 U.S. 242 (1980), reh'g denied, 448 U.S. 916 (1980) 20, 21

USACO Coal Co. v. Carbomin Energy, 689 F.2d 94 (6th Cir. 1982) 16

Van Schaick v. Church of Scientology of California, 535 F. Supp. 1125 (D. Mass. 1982) 31

Wilcos v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984) 33

Wilkinson v. Paine, Webber, Jackson & Curtis, 585 F. Supp. 23 (N.D. Ga. 1983) 32

Windsor Associates v. Greenfeld, 564 F. Supp. 273 (D. Md. 1983) 34

Yancoski v. E.F. Hutton & Co., 581 F. Supp. 88 (E.D. Pa. 1983) 32, 33

Page

Statutes Cited:

18 U.S.C. § 922 20

18 U.S.C. § 1341 14

18 U.S.C. § 1343 14

18 U.S.C. § 1951 (1946) 35

18 U.S.C. § 1953 (1961) 35

18 U.S.C. § 1961 ..... passim

18 U.S.C. § 1962 ..... passim

18 U.S.C. § 1963 ..... 4, 8, 16, 22

18 U.S.C. § 1964 ..... passim

18 U.S.C. § 2320 (1984) 27

18 U.S.C. §§ 3575(d), (e), (g) 16

18 U.S.C. §§ 3576-3577 16

28 U.S.C. § 1254(1) 2

33 U.S.C. § 1321(b)(6) 20

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 ..... 23, 40

Page

United States Constitution Cited:

Fourth Amendment 26

Fifth Amendment 21

Rule Cited;

Fed. R. Civ. P. 54 8

Other Authorities Cited:

Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies, 53 Temp. L.Q. 1009 (1980) 18, 19

G. Blakey, The RICO Civil Fraud Action in Context: Reflection on Bennett v. Berg, 55 Notre Dame L. Rev. 237 (1982) 12, 17, 18, 19, 40

H. Edelhertz, The Nature, Impact, and Prosecution of White Collar Crime 6-7 (1970) 41

Groon, Proof of Crime in a Civil Proceeding, 39 Minn. L. Rev. 556 (1929) 21

McClellan, The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame L. Rev. 55 (1970) 38

M. Gurfein, Organized Crime in America 181-82 (G. Tyler ed. 1962) 34

Page

Black's Law Dictionary (5th ed. 1979)..... 13

The American Heritage Dictionary of the English Language (1981)..... 13

The Random House Dictionary of the English Language (unabridged ed.) (1967) 13

Webster's Third New International Dictionary (unabridged ed. 1961).....13, 14

Webster's Ninth New Collegiate Dictionary (1983) 13

Hearings on the Department of State, Justice and Commerce, the Judiciary, and Related Agencies, Subcommittee on Appropriations, House of Representatives, 96th Cong. 2d Sess. 17 (1980)..... 41

Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 475 (1969).....36, 37

Organized Crime Control: Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 538 (1970) ... 19

S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969) 37

S. Rep. No. 617, 91st Cong., 1st Sess. 82 (1969) 17

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970) 39

Page

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 294 (1970).... 37

115 Cong. Rec. 6993 (1969) 17

115 Cong. Rec. 6994, 6995 (1969) 37

116 Cong. Rec. 18,913 (1970) 38

116 Cong. Rec. at 18,940..... 38

116 Cong. Rec. at 18,945..... 38

116 Cong. Rec. 35,204 (1970) 22, 36

116 Cong. Rec. 35,205 (1970) 39

116 Cong. Rec. 35,342 (1970) 17

116 Cong. Rec. at 35,343 38

116 Cong. Rec. at 35,344 .....38, 39

116 Cong. Rec. at 35,346 39

No. 84-648

In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX CO., INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

OPINIONS AND ORDERS BELOW

On July 25, 1984, the court of appeals filed an opinion and entered a judgment in *Sedima v. Imrex,* 741 F.2d 481 (2d Cir. 1984) (No. 83-7965) (Pet. App. 1a-59a), *cert. granted,* 105 S. Ct. 901 (Jan. 14, 1985) (No. 84-648). The judgment is set forth in the Joint Appendix (J. App. 32a).

* The assistance in the preparation of this brief of Benjamin M. Pinczewski (St. John's Law School '85) is hereby acknowledged.

On November 16, 1983, the district court filed a memorandum and order which it then supplemented on November 18, 1983, in *Sedima v. Imrex,* 574 F. Supp. 963 (E.D.N.Y. 1983) (No. 82 Civ. 2161) (Pet. App. 60a-64a).

JURISDICTION

The judgment of the court of appeals (J. App. 32a) was entered on July 25, 1984. The petition for a writ of *certiorari* was filed on October 19, 1984, and granted on January 14, 1985. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1961.

Definitions

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this

chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Title 18, United States Code, Section 1962.

Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Title 18, United States Code, Section 1964.

Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioner Sedima, S.P.R.L. ("Sedima"), filed a civil action in the United States District Court for the Eastern District of New York on July 23, 1982. A timely answer was interposed by the respondents Imrex Company, Inc. ("Imrex") and Gidon Armon.

After some discovery in the form of depositions and document production, Sedima moved for leave to amend its complaint to allege claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1978) (as amended) (originally promulgated as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970), and amended Pub. L. No. 95-575, § 3(c), 92 Stat. 2465 (1978); Title III, Pub. L. No. 95-598, § 3(c), 92 Stat. 2677) (1978) and to add Jacob Armon as a defendant. The motion was granted on consent by a stipulation and order and the amended complaint was served.

By notice of motion dated July 7, 1983, Imrex and the Armons moved to dismiss the RICO claims asserted against them in the amended complaint (J. App. 5a).

Sedima, a Belgian corporation headquartered in Brussels, is a supplier of electronic, mechanical and hydraulic components for the aerospace and defense industries. Imrex, a New York corporation headquartered in Great Neck, New York, is engaged in the export of aircraft and aircraft-related electronic parts for the aerospace industry. At the relevant times, Gidon Armon was the president and a shareholder of Imrex and his son Jacob Armon was an officer of the company. After the start of this action, Gidon Armon stepped aside as president and his son Jacob assumed that title.

In late 1977, Sedima learned that the North Atlantic Treaty Organization ("NATO") was about to commence a program to

overhaul and upgrade HAWK missile systems deployed in Belgium. The program was planned in two steps known as "Belhip" and "PIP" under the auspices of Ateliers de Constructions Electriques Charleroi ("A.C.E.C.") (J. App. 9a).

In 1979, Sedima, through its founder and director Menachem Weiss, and Imrex through its then president Gidon Armon, entered into a joint venture for the purpose of supplying the electronic and hydraulic components for the HAWK missile programs to A.C.E.C. They agreed to share equally in the profits and losses of the joint venture (J. App. 9a).

The amended complaint then describes the way in which the joint venture operated. Sedima was responsible for procuring orders from A.C.E.C. and supplying Imrex with the part specifications and identities of the authorized manufacturers or vendors (J. App. 9a). In addition, Sedima was responsible for negotiating on behalf of the joint venture with A.C.E.C.(J. App. 9a). For its part, Imrex executed the orders in the United States on behalf of the joint venture and provided Sedima with trade documentation (J. App. 9a).

When A.C.E.C. ordered electronic components from the joint venture, Sedima advised Imrex and furnished part specifications and manufacturer's information as required by NATO. In turn, Imrex issued purchase orders to the authorized manufacturer setting forth the specifications. As confirmation that the purchase had in fact been made and as a representation of the price and other terms, Imrex was required to send Sedima a copy of each purchase order that it issued.

The amended complaint describes the fraud that occurred (J. App. 10a-13a). Rather than sending copies of the actual purchase orders, the Armons, as officers of Imrex, prepared bogus purchase orders which they caused to be mailed to Sedima (J.

App. 10a). These bogus purchase orders overstated the cost of component parts and misrepresented the terms on which they were purchased by the joint venture (J. App. 10a).

Later, when Imrex assembled orders for shipment to Europe, the Armons caused Imrex to send credit memoranda overstating the cost of the electronic parts being shipped (J. App. 10a). These credit memoranda were supposed to recite the sales price for the particular shipment and the actual price paid by the joint venture for those items. Imrex was paid on the basis of the fraudulent credit memoranda that it sent to Sedima with the shipments.[1]

1. For example, the record below on the motion to dismiss shows that in June 1980 A.C.E.C. purchased a transistor part number JANTX2N2369A from the joint venture. After receiving that order from Sedima, Imrex purchased those transistors from Schweber Electric in New York at a unit price of $4.83. When Imrex sent the true purchase order to Schweber, the Armons created a bogus purchase order showing a unit price of $5.25 which Imrex then sent to Sedima. While the true purchase orders were kept in Imrex's accounting department, the Armons personally maintained a confidential file containing copies of the bogus purchase orders that had been sent to Sedima. Indeed, they made handwritten notations on the purchase orders for the purpose of keeping themselves informed about what had been falsified.

Later, when a shipment was being readied for Sedima, Imrex's traffic department generated an invoice addressed to Sedima listing the specific components and the sales prices to be charged A.C.E.C. The traffic department also prepared a credit memorandum for Sedima. This document accompanied each invoice and showed the total sales price of the invoiced items, deducted the costs of materials and calculated the profit to be divided between the joint venturers.

The Armons have testified that after the invoices and credit memos were prepared by the traffic department, they personally reviewed them. At that time, they secretly recomputed the cost of materials for each of the items listed on invoices addressed to Sedima so that the cost of material on the credit memo could include the falsely inflated prices appearing on the bogus purchase orders. After recomputing the credit memo, a new credit memo was created reflecting the inflated cost of materials.

As a result of these misrepresentations, the amended complaint alleges that Sedima was led to believe that the joint venture was paying more money to acquire the component parts than was actually the case (J. App. 10a). When the profits were divided, Imrex received its share as well as that amount by which the Armons had inflated the cost of the materials (J. App. 10a).

The RICO claims in the amended complaint assert that Imrex and the Armons "while associated with and/or employed by an enterprise engaged in and/or the activities of which affected interstate and foreign commerce, conducted and participated in the conduct of such an enterprise's affairs through a pattern of racketeering activities." (J. App. 18a). The amended complaint also alleges that Imrex and the Armons "sent and/or caused to be sent through the United States mails, fraudulent purchase orders to Sedima with the intent to and with the sole purpose of defrauding Sedima." (J. App. 20a).

Many acts of mail fraud and wire fraud are pleaded by alleging that Imrex and the Armons "communicated with Sedima on numerous occasions by means of the United States mails and by telephone thereby misrepresenting the terms and conditions of the purchases that Imrex had made on behalf of the joint venture." (J. App. 20a). That claim is particularized in a subsequent allegation where the amended complaint asserts "Imrex and the Armons caused said fraudulent invoices and credit memorandum to be deposited in the United States mails for delivery to Sedima with the intent to and for the sole purpose of defrauding Sedima." (J. App. 20a). Sedima also tracked the statutory language when it alleged that it "has been injured in its business by reason of the aforesaid violation of the RICO statute."[2] (J. App. 22a).

2. The secret moneys that Imrex received because of its bogus purchase orders were deposited into Imrex's corporate accounts and used by the Armons in the operation of their business. By that device, Imrex and the Armons harmed Sedima and enhanced their ability to harm others.

Between 1979 and the start of this litigation, approximately $8,500,000 in orders were received by Sedima on behalf of the joint venture from A.C.E.C. (J. App. 19a). Sedima alleges its injury due to the fraud exceeded $175,000 (J. App. 15a).

In the final count of the amended complaint Sedima alleges that the Armons conspired to violate the provisions of 18 U.S.C. § 1962(c) and that the alleged conspiracy constituted a violation of 18 U.S.C. § 1962(d) (J. App. 23a).

The district court dismissed the RICO counts in the amended complaint on the grounds that there was no allegation of RICO-type injury apart from that which would have resulted directly from the 18 U.S.C. § 1961(1) predicate acts. After an express direction for the entry of judgment pursuant to Fed. R. Civ. P. 54, Sedima appealed.

The court of appeals affirmed the district court and held that, aside from a showing of "mobster"-type harm or other distinct injury, a criminal conviction on the 18 U.S.C. § 1961(1) predicate acts was necessary to bring a civil RICO claim.

SUMMARY OF ARGUMENT

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1978) (as amended), provides for treble damages to "any person injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c). Violations of section 1962 include "conduct[ing] or participat[ing] . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). "A pattern of racketeering activity" is defined in section 1961 as "at least two acts of racketeering activity . . . within ten years," 18 U.S.C. § 1961(5), and "racketeering activity" is defined to include within its reach "any act which is indictable under . . .

section 1341 (relating to mail fraud) [or] section 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1).

The interlocking definitions of the Act and their selective use show that Congress carefully considered the linkages between them. The plain language of section 1962 when read with section 1964(c) authorizes civil suits against all persons who engage in "indictable" acts. A prior criminal conviction for predicate acts is not required to perfect a RICO civil claim.

Section 1964(c) is a civil remedy and as general reform legislation, Congress directed that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452 § 904(a) (1970).

The prior criminal conviction requirement imposed by the court of appeals as a condition precedent to maintaining a civil RICO claim is clearly in error. It is contradicted by the unambiguous language of the statute, the intent expressed in the legislative history and the overwhelming majority of case authorities.

The judical engraftment of a prior conviction requirement has emasculated the statute and tied the rights of private litigants to the outcome of criminal prosecutions. The court of appeals overstepped its Article III authority and impermissibly intruded on Congress' Article I power. Therefore, this Court has a clear basis for exercising its power to reverse the decision below.

The language of section 1964(c) authorizes a civil claim whenever any injury is sustained "by reason of" a RICO "violation". Despite the plain language of that statute, the court of appeals dismissed Sedima's RICO claims on the grounds that it had not alleged a "mobster"-type injury. The court never defined that term nor did it distinguish between a "mobster"-type injury

and an injury caused by the operation of an enterprise through a pattern of racketeering.

The limitation imposed by the court of appeals cannot be justified on the basis of the language of civil RICO. The court of appeals improperly inferred its existence by analogy to the antitrust laws. However, their rationale is fundamentally flawed because RICO and the antitrust laws do not have a common purpose. Antitrust injury arises out of the need to distinguish between damages that will promote competition and those that will not. That need is absent from RICO since its broad purpose is to secure compensation for "any person" victimized by a RICO violation.

Congress intended RICO to be an instrument for both the government and private litigants to combat "racketeering." "Racketeering" is not a status, it is proscribed activity. By requiring a "mobster"-type injury, the court of appeals has imposed an artificial and unwarranted burden on RICO plaintiffs.

ARGUMENT

I.

THE JUDICIALLY-FORGED PROHIBITION AGAINST CIVIL RICO CLAIMS ABSENT PREDICATE ACT CONVICTIONS IS AN IMPERMISSIBLE INFRINGEMENT ON LEGISLATIVE AUTHORITY.

Employing casuistic reasoning, the court of appeals held that "a prior criminal conviction [of predicate acts] is a prerequisite to a civil RICO action." (Pet. App. 28a). This court-made requirement of a prior criminal conviction for 18 U.S.C. § 1961(1) predicate acts is a direct affront to the Legislative power vested in Congress. It flies in the face of the unambiguous language of § 1964(c) and other pertinent provisions of RICO, disregards relevant legislative history, and conflicts with most of the decisions that have ruled on this issue.

A. The plain language of RICO does not require a predicate act conviction to perfect an 18 U.S.C. § 1964(c) claim.

Analysis of RICO begins with its text. *Russello v. United States,* 104 S. Ct. 296, 299 (1983) (quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981)). Section 1964(c) unambiguously provides that "[a]ny person injured in his business or property by reason of a *violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee." (Emphasis supplied.) Thus, the civil remedies provision directs the reader to the prohibited activities section, says nothing about the need for a prior criminal conviction, and does not support the prior conviction requirement engrafted on the statute by the court of appeals.

In turn, the prohibited activities statute speaks in terms of persons who "conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). To understand what Congress meant by the use of the technical term "pattern of racketeering activity" one must look to the definitions contained in the statute.

Congress provided the answer in 18 U.S.C. § 1961. In a concise and controlled schema, it defined "racketeering activity" as *inter alia* "any act which is indictable under . . . [*inter alia*], section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1). Linked to that definition was the term "pattern of racketeering activity" which Congress defined as "at least two acts of racketeering activity . . . within ten years . . . ." 18 U.S.C. § 1961(5). These definitions are interlocking and their selective use in the operative provisions of the statute shows that Congress carefully considered the linkages. Given the statutory craftsmanship in the selective use of defined terms, the court of appeals was wrong to disregard linkages. *See Haroco v. Am. Nat'l Bank & Trust Co. of Chicago,* 747 F.2d 384, 386 (7th Cir. 1984) (RICO is "constructed on the model of a treasure hunt.").

Thus, the plain language of section 1962 when read with section 1964(c) authorizes a civil suit against "any person . . . [who] conduct[s] or participate[s] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962. Section 1962, it should be understood, "is *not* a criminal statute; it says 'unlawful,' not criminal. . . . [T]he role of § 1962 is to set a legal standard, not to define a crime." G. Blakey, *The RICO Civil Fraud Action in Context: Reflection on Bennett v. Berg,* 55 Notre Dame L. Rev. 237, 243 (1982) [hereinafter cited as *Civil Action*].

Assuming that "legislative purpose is expressed by the ordinary meaning of the words used," RICO nowhere requires

that a civil defendant be previously "convicted" of the predicate acts alleged in the amended complaint. The statute only requires that the acts in question be "indictable," or that there be a "violation" not a conviction. *Russello,* 104 S. Ct. at 299 (quoting *Richards v. United States,* 369 U.S. 1, 9 (1962)).

The Random House Dictionary of the English Language (unabridged ed.) (1967) defines "violation" as "a breach, infringement or transgression . . . ." Similarly, *Black's Law Dictionary* (5th ed. 1979) defines a violation as "injury; infringement; breach of right, duty or law . . . ." Such a violation of section 1962 occurs when an individual or entity engages in specified "unlawful" conduct. "Unlawful conduct" includes *inter alia* participating in the conduct of such an enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962 (1970).

Thus, if a civil defendant engages in the specified unlawful conduct, then he has violated section 1962 and is subject to being sued under section 1964(c). The statute does not say that he has to be convicted; it requires only that the civil defendant engaged in a prohibited activity.

The language of RICO's civil provisions is not concerned with any ultimate determination made in the context of a criminal proceeding or even whether a prosecution has been initiated. Rather, it focuses on a description of the acts engaged in by the putative civil defendant. Thus, the key words are "chargeable" and "indictable." In ascertaining what constitutes "chargeable" or "indictable" acts, the words must be understood according to their "ordinary meaning." *Russello,* 104 S. Ct. at 299 (1983).

Webster's Ninth New Collegiate Dictionary (1983) defines the suffix "-able" as meaning "capable of, fit for, or worthy of." *The American Heritage Dictionary of the English Language* (1981) says "susceptible, capable, or worthy of." *Webster's Third*

New International Dictionary (unabridged ed. 1961) instructs that the meaning of the suffix "-able" is "capable of, fit for, or worthy of (being so acted upon or toward) — chiefly in adjectives derived from verbs . . . ." Thus, the suffix "-able" does not mean, in fact, actually acted upon.

A civil RICO defendant who has committed predicate acts is "chargeable" or "indictable" and thus susceptible to criminal prosecution. His acts must fall within the conduct prescribed by the criminal statutes enumerated by RICO. Once his conduct comes within the ambit of the criminal statute he is a proper party defendant in a civil RICO action. RICO's language requires the commission of the acts in the conduct of the enterprise. RICO does not require the civil defendant to have been actually charged or indicted — much less convicted or punished — for those acts.

Sedima alleges in its amended complaint that Imrex and the Armons participated in the affairs of an enterprise through a "pattern of racketeering." (J. App. 18a, 20a, 22a).

The "racketeering activity" necessary for a violation of § 1961(1)(B) (1978) includes certain predicate acts "chargeable under State law" or "indictable" under, *inter alia,* 18 U.S.C. § 1341 (1970) (relating to mail fraud) or 18 U.S.C. § 1343 (1956) (relating to wire fraud). Numerous "indictable" acts of mail fraud and wire fraud are pleaded in the amended complaint.

Despite the ordinary meaning of the words, the court of appeals transmogrified the words "chargeable" and "indictable" to "previously convicted." It ignored the plain meaning of the words, choosing instead to define them in terms of what it guessed Congress might have intended. The court of appeals stated:

> As for the language "any act which is indictable" (or "chargeable"), conceivably

> Congress meant by the choice of these words to suggest either that indictments or, in the case of certain state felonies informations, are not required, since the acts need only be "indict*able*" or charge*able*" (emphasis added). But a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts power to determine whether an act is "indictable" in the absence of the properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts — proved by a preponderance of the evidence only — and say that these facts make out acts which are "indictable" or "chargeable."

(Pet. App. 35a-36a).

This analysis is clearly at variance with normal rules of construction. "[A]bsent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *United States v. Apfelbaum,* 445 U.S. 115, 121 (1980) (construing Title II of the Organized Crime Control Act). The ruminations of the majority in Sedima about "plausible alternatives" to what "conceivably Congress meant" do not even approach evidence of contrary legislative intent.

The court of appeals' analysis is belied by the structure of the Organized Crime Control Act as a whole and Title IX in particular. The Organized Crime Control Act "is a carefully crafted piece of legislation." *Iannelli v. United States,* 420 U.S. 770, 789 (1975). Conspicuously absent is any suggestion that prior convictions are required to bring a civil RICO claim.

Indeed, when Congress required a conviction as part of the legislative scheme of the Organized Crime Control Act, it knew how to say it. Title X, 18 U.S.C. §§ 3575-3578 (1970), speaks of "conviction[s]" at several points. *See, e.g.,* 18 U.S.C. §§ 3575(d)-(e), (g), 3576-3577. *Cf. Iannelli,* 420 U.S. at 786-89 (construing Title VII in light of Titles IX and X).

Even RICO itself demonstrates Congress' deliberate avoidance of a prior conviction requirement in § 1964(c). That Congress was careful is reflected by its selective use of the term "conviction" within the RICO statute. Neither the term "conviction" nor any variant thereof appears in §§ 1961, 1962, or 1964(c). In the same way that § 1964(c) provides that violations of § 1962 create a private right of action for damages, § 1963 provides that violations of § 1962 are criminal.[3] "If Congress had intended to limit liability under § 1964(c) only to those convicted of or charged with RICO crimes, it would have done so within § 1964(c) by referring to § 1963 or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963." *Bunker Ramo Corp v. United Business Forms,* 713 F.2d 1272, 1287 (7th Cir. 1983) (quoting *USACO Coal Co. v. Carbomin Energy,* 689 F.2d 94, 95 (6th Cir. 1982)). Congress' decision not to use the term "conviction" in § 1964(c) manifests an intent to authorize civil RICO claims in the absence of prior criminal convictions for 18 U.S.C. § 1961(1) predicate acts.

---

3. Section 1963(c) provides that "[u]pon *conviction* of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under the section . . . ." (Emphasis supplied.)

Similarly 18 U.S.C. § 1964(d) (1970) provides that a previously convicted RICO defendant shall be estopped "from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."

B. The legislative history of RICO underscores the statute's preventive and remedial purposes and does not suggest that a criminal conviction is a condition precedent to a civil claim.

RICO's legislative history supports the conclusion that prior convictions of 18 U.S.C. § 1961(1) predicate acts are unnecessary to the prosecution of civil claims under the statute.

Congress' intent that § 1964 be a remedial statute could not be more explicit. 84 Stat. 947 (1970) ("remedial purposes"); S. Rep. No. 617, 91st Cong., 1st Sess. 82 (1969) (Title IX "[is] remedial rather than penal"); *United States v. Turkette,* 452 U.S. 576, 593 (1981) (RICO is "both preventive and remedial"). Senator Hruska observed: "[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill." 115 Cong. Rec. 6993 (1969). Concern about frivolous suits under civil RICO led Representative Mikva to acknowledge that "there need not be a conviction under any of these laws for it to be racketeering." 116 Cong. Rec. 35,342 (1970). The court of appeals' attempt to discount Representative Mikva's remarks is embarrassing.[4]

---

4. The court of appeals was obviously aware of this legislative history, but chose to disregard it. Downplaying the significance of other remarks made by Representative Mikva in connection with his proposed amendment, the court of appeals stated: "Deriving legislative intent from a dissenting congressman's 'parade of horrors' speeches in opposition is a notoriously dubious practice." (Pet. App. 16a n.22.)

The implication that Representative Mikva did not understand the scope and intent of civil RICO is unwarranted. Representative Mikva was a former law clerk in the United States Supreme Court. He served on the National Commission on Reform of the Federal Criminal Law, which examined a number of concepts subsequently embodied in RICO. *See Civil Action, supra,* p. 12, at 253 n.47. He was a member of the House Judiciary Committee which studied the bill. Representative Mikva, now a judge in the District of Columbia Circuit, obviously knew what he was saying when he commented that a prior conviction was unnecessary.

That § 1964 is intended to be remedial also reflects the judgment of Congress since 1970. The Senate Judiciary Committee, in reporting out the criminal code bill in 1981, described RICO in these terms: "[I]t is hoped the knowledge that a person will be subject to substantial civil damages will serve as an effective deterrent to the commission of . . . [a RICO] offense. [However,] [t]he purpose of the [treble damage civil recovery] . . . is remedial, not penal; adequate relief or compensation is the main goal." *Civil Action, supra,* p. 12, at 237, 267.

The court of appeals, by contrast, derived its view of Congress' intent from a skewed analysis of RICO's language. It began by noting that "[t]he Act is designed to provide new penalties and remedies to combat conduct which explicitly has *already been found criminal.*" (Pet. App. 37a; emphasis supplied). To support its predisposition, the court of appeals relied on Professor G. Robert Blakey's comment that RICO did not itself " 'draw a line between criminal and innocent conduct,' but rather 'authorized the imposition of different criminal or civil remedies for conduct already criminal, when performed in a specified fashion.' "[5] (Pet. App. 37a; emphasis in original).

Not only did the court of appeals alter Professor Blakey's words, it wrenched them out of context. In fact, Professor Blakey was arguing that "[o]nce the policies of strict construction or leniency had been implemented in the construction of the underlying 'racketeering activity,' and the line had been crossed into the sphere of criminality, it was inappropriate to further

5. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies,* 53 Temp. L.Q. 1009, 1032 (1980) [hereinafter cited as *"Basic Concepts"*]. Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-70 when the Organized Crime Control Act was processed.

restrict the scope of the statute by reapplying these policies." *Basic Concepts, supra,* p. 18 n.5, at 1032. This argument does not aid the court of appeals' reasoning, instead, it undermines the majority's narrow interpretation of § 1964(c).

In buttressing its contention that criminal convictions must precede civil claims, the majority went on to state that although "RICO liability simply does not exist without criminal conduct," nonetheless, "in a civil context, there is no way to know whether the conduct in question is 'already criminal.' " (Pet. App. 38a). The court conjectured that, "had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c)."[6] After analyzing certain problems (*e.g.,* burden of proof) "of which there is no indication that Congress even dreamed," (Pet. App. 38a), the majority concluded: "[i]t is this peculiar structure of RICO that strongly suggests that, had Congress considered the problem, *it would have intended* criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action." (Pet. App. 41a; emphasis supplied).

Congress not only considered the problem but the consensus was that the burden of proof under the civil remedies section should be a "preponderance of the evidence." For example, Congressman Poff remarked: "[T]itle IX is really in two parts, one criminal and one civil. The burden of proof under the civil-remedies section, section 1964, is much less." *Organized Crime Control: Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary,* 91st Cong., 2d Sess. 538, 665 (1970) (remarks of Congressman Poff).[7]

6. The court of appeals subsequently noted that Congress omitted "to examine this problem except very obliquely." (Pet. App. 40a n.57).

7. *See Civil Action, supra,* p. 12, at 258 n.59.

Congress has often provided both criminal and civil remedies in exercising its authority to regulate interstate commerce. *United States v. Ward,* 448 U.S. 242, 249 (1980), *reh'g denied,* 448 U.S. 916 (1980). Given the complementing use of civil and criminal penalties in many statutes, there was no justification for the court of appeals' concern that absent a prior criminal conviction, courts could not recognize unlawful activity and address it in the context of a civil case. *See, e.g., United States v. One Assortment of 89 Firearms,* 104 S. Ct. 1099 (1984) (forfeiture proceeding after seizure of firearms for violation of 18 U.S.C. § 922); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972) (forfeiture proceeding for customs fraud); *Helvering v. Mitchell,* 303 U.S. 391 (1938) (recovery of civil monetary penalties for fraudulent evasion of income tax). As Circuit Judge Cardomone noted in his dissent "[t]his implicit conclusion is at odds with analogous case law in such areas as civil forfeitures, penalties and deportation cases which teaches that the correct procedure is for a court in a civil case to assure, on a selective basis, the existence of certain procedural safeguards, that would otherwise be applicable only in criminal cases." (Pet. App. 49a).

The majority in *Sedima* appears to have forgotten the methodology developed by the Court for challenges to civil remedies on the ground they are "quasi-criminal" or sufficiently "punitive" to require the procedural protections of a criminal trial developed by this Court. Just recently, in *United States v. Ward,* 448 U.S. 242 (1980), this court reviewed a challenge to Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1321(b)(6), which permitted the government to assess a civil penalty of up to $5,000 for each violation of the FWPCA. In applying a two-step analysis, this Court first looked to see "whether Congress, in establishing the penalizing mechanism, indicated . . . a preference for one label or the other." *Ward,* 448 U.S. at 49. If Congress indicated a preference, that expression of intent is entitled to deference. *One Assortment of 89 Firearms,* 104 S. Ct.

at 1106. Where, as with RICO, Congress signalled a preference for a civil penalty, then, the analysis proceeds to a second step to determine whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention." *Ward,* 448 U.S. at 238.

Monetary damages are not sufficiently punitive to require Fifth Amendment criminal safeguards. *See Ward,* 448 U.S. at 249. The recovery of more than actual damages constitutes statutorily determined adequate compensation traditionally allowable in civil proceedings without criminal law safeguards. *See, e.g., United States v. Bornstein,* 423 U.S. 303, 313-16 (1976).

Civil courts have long had the power to determine criminal issues in a civil action subject of course to differing burdens of proof. *Kincade v. Bradshaw,* 3 Hawks (N.C.) 63 (1824). There, in an action for slander, the jury was instructed that the evidence should be such as would convict the plaintiff if he were on trial for the offense.[8]

Thus, the court of appeals twisted statutory construction and construed the broad remedial legislation so narrowly as to make it meaningless. It substituted its judgment for that of the Congress, concluded that the language of the statute was ambiguous, and then derived legislative intent from an examination of that "ambiguous" language. Such a method of analysis can support virtually any proposition, no matter how preposterous.

C. Prior criminal conviction requirement — an unsound judicial engraftment.

Virtually every court that has considered the prior criminal conviction argument rejected it as lacking any support in RICO's

---

8. *See,* Groon, *Proof of Crime in a Civil Proceeding,* 39 Minn. L. Rev. 556 (1929).

language or legislative history. (*See* Pet. App. 30a n.42, 31a n.43.) Significantly, most civil RICO decisions have not even thought it an issue worth addressing.[9]

The court of appeals questioned the soundness of those decisions which relied upon *United States v. Cappetto,* 501 F.2d 1351 (7th Cir. 1975), *cert. denied,* 420 U.S. 925 (1975). The majority reasoned: since *Cappetto* dealt solely with the government's ability to secure a civil injunction under § 1964(a), *Cappetto's* rejection of a prior conviction requirement "made no holding with respect to private civil actions." (Pet. App. 29a).

This conclusion ignores the deliberate and parallel use of the term "violation" in §§ 1963(a), 1964(a), and 1964(c). Section 1962, and, therefore § 1961(1), apply equally to all three sections which speak in terms of "violation."[10] The use of "violation" in the civil portion of the statute when juxtaposed against the use of "conviction" in the criminal portion of the statute is a legislative distinction that makes a difference. It points to the structure of RICO as a integrated whole.[11] As Mr. Justice Cardozo stated in

9. Indeed, the district court never mentioned a prior criminal conviction requirement and on appeal the parties never raised it. Phoenix-like, the criminal conviction requirement was raised by the court of appeals *sua sponte* in *Sedima* after the issue appeared to have been long settled.

10. The imposition of a prior criminal conviction requirement, therefore, places the decision below in conflict with the holdings in *United States v. Licavoli,* 725 F.2d 1040, 1047 (6th Cir. 1984) (criminal RICO); *United States v. Malatesta,* 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied sub nom. Bertolotti v. United States,* 440 U.S. 962 (1979) (criminal RICO); and *United States v. Frumento,* 563 F.2d 1083, 1087 (3rd Cir. 1977), *cert. denied sub nom. Sills v. United States,* 434 U.S. 1072 (1978) (criminal RICO).

11. Congressman Poff, one of the sponsors of RICO, observed that in his "experience, no single measure [had] received more thorough consideration than this bill." 116 Cong. Rec. 35,204 (1970).

George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 378 (1933): "There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." That unity is present in RICO.

It also ignores Congress' direction that RICO "be liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a) (1970).[12]

Uncomfortable with the scope of § 1964(c), a statute broadly written and conceived, the court of appeals redrafted it, creating a remedy so lacking in force as to nullify Congress' explicit intention to create "new remedies to deal with the unlawful activities of organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23.

The court of appeals overstepped the limits of its Article III authority and impermissibly intruded on Congress' Article I power. *See United States v. Turkette,* 452 U.S. at 587 ("In the face of . . . objections [dealing with federal and state relations] Congress nonetheless proceeded to enact [Title IX] . . . . There is no argument that Congress acted beyond its powers in so doing. That being the case, the Courts are without authority to restrict the application of the statute.").

Speaking for the Court in *United States v. Braverman,* 373 U.S. 405, 408 (1963), Justice Black warned federal courts not to "interpret a statute so narrowly as to defeat its obvious intent." Article III of the Constitution does not confer a court with the power to redraft legislation because of its "appraisal of wisdom

12. There is no conflict between the rule of lenity and the liberal construction clause. *See Tarrant v. Ponte,* 751 F.2d 459 (1st Cir. 1985) (lenity serves only as an aid for resolving an ambiguity; it is not to be used to create one). But, of course, section 1964(c) is a civil provision.

or unwisdom of a particular [legislative] course." *Diamond v. Chakrabarty,* 447 U.S. 303, 318 (1980) (quoting *TVA v. Hill,* 437 U.S. 153, 194 (1978)). This Court has repeatedly cautioned lower court judges that the "interpretation of a statute" is the "starting point" in ascertaining legislative intent. *Lewis v. United States,* 445 U.S. 55, 60 (1980) (citing *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979)); *see also Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979); *Southeastern Community College v. Davis,* 442 U.S. 397, 405 (1979).

The court of appeals erred by ignoring all these jurisprudential precepts and embarked instead on a perilous course of judicial legislation.

First, the court of appeals determined that the language of § 1964(c) is ambiguous (Pet. App. 10a). That conclusion rested on their observation that RICO "has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead, led to claims against such respected and legitimate 'enterprises' as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Sterns & Co., and Merrill Lynch, to name a few defendants labeled as 'racketeers' . . . ." (Pet. App. 9a-10a). Dissenting from that view, Circuit Judge Cardamone asserted that: "[S]tigma alone ordinarily does not suffice to convert a proceeding from civil to criminal. *See Ullmann v. United States,* 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956) . . . I, for one, believe the public is sophisticated enough to distinguish between a criminal conviction and a civil claim. To be named as a RICO defendant is not quite the Sword of Damocles that the majority would have it." (Pet. App. 55a).

A federal court has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 626 (1978), *reh'g denied,* 439 U.S. 884 (1978). "Once Congress addresses a subject . . .

the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77, 96 n.34 (1981).

Second, the court of appeals determined that "[t]he most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of § 1964(c)." (Pet. App. 19a). Given the unambiguous language of the statute, that conclusion by the court of appeals is just a guess. Imaginative constructs about what Congress might have done cannot take the place of the carefully defined terms in RICO. Such conjecture is clearly impermissible.

Third, putting aside the ordinary meaning of the words of the statute and twisting the legislative history, the court of appeals then devised its own prior convictions and standing requirements. The substitution of private views of judges for regularly enacted statutes should not be countenanced. Because "Congress cannot be expected to specifically address each issue of statutory construction which may arise," *Albernaz v. United States,* 450 U.S. 333, 341 (1981), Congress directed the courts to liberally construe RICO. Perhaps more than anything else, this direction indicates Congress' intent.

The court of appeals *sua sponte* created a prior conviction requirement. By that act of creation it ventured well beyond the established bounds of judicial interpretation. The requirement of prior predicate act convictions is indefensible. This Court has a clear basis for exercising its power to reverse the decision below.

D. The conviction requirement will be a *contra* force on the administration of justice.

A practical effect of a prior conviction requirement will be to create an atmosphere where private litigants are forced to involve themselves in the criminal justice system in order to bolster their

respective civil cases. For their part, plaintiffs will be tempted to press local United States attorneys to commence prosecutions of suspected 18 U.S.C. § 1961(1) predicate acts in order to obtain the prior convictions necessary to bring suit. Defendants, sensing the imminence of a RICO civil claim with concomitant threefold damages and attorneys' fees, will be more likely to ingratiate themselves with state prosecutors in order to ward off federal prosecutions for 18 U.S.C. § 1961(1) predicate acts like mail fraud or wire fraud.

The judicial engraftment of a prior criminal conviction requirement is thus not only bad law but also bad policy. Federal prosecutors will be subject to charges of stalking potential RICO defendants and serving as collection agencies for RICO civil plaintiffs. Federal and state prosecutors alike will be subject to additional and needless pressures from private litigants.

The prior criminal conviction requirement in civil RICO cases will also undermine the prosecution of criminal RICO cases. Whether true or not, the complaining party who testifies in the criminal prosecution will undoubtedly be challenged on the grounds that his testimony, if accepted in the criminal proceeding, will give him standing to sue under civil RICO and recover threefold his damages.

The prior conviction requirement will also make the application of civil RICO haphazard in situations involving multiple participants. For instance, where one of the participants is immunized or negotiates a non-predicate act plea and then admits his participation in § 1962 activities, that self-confessed RICO violator (racketeer) would not be subject to suit under *Sedima*. Similarly, other anomalous situations will undoubtedly arise where a grand jury properly returned a RICO indictment which was subsequently dismissed on grounds having nothing to do with the merits, *viz.*, suppression of critical evidence as a result of government's violation of Fourth Amendment rights.

The prior criminal conviction requirement will also have unsettling repercussions in other areas. For instance, from what date should the statute of limitations on a civil RICO claim begin to run? The date the fraud is discovered or the date the criminal conviction is obtained. From its opinion, there is no indication that the court of appeals "even dreamed" of that problem when it rewrote RICO. Indeed, aside from redrafting RICO, the court of appeals has required a rewriting of the statute of limitations. If Congress had wanted to vary the rule so sharply then they undoubtedly would have done so.

The prior criminal conviction requirement will compound the statute of limitations by splitting causes of action and giving a plaintiff two separate opportunities to prove his allegations of fraud in court. His first day in federal court will come when he proves his common law fraud claim; the second opportunity comes later after the RICO criminal conviction when he proves his RICO civil claim.

The parallel civil and criminal provisions in the RICO statute were modelled on antitrust law. In particular, the legislative scheme for civil actions by private attorneys general was borrowed to carry out Congress' objectives. The majority in *Sedima* guts this legislative plan where private attorneys general sue when they have been victimized by the proscribed activities. The requirement of a criminal conviction turns any private action into a caboose for the government's prosecution.

A final danger with *Sedima* is that once accepted, it will affect other cases. Congress has used the statutory schemer of civil proceedings in the context of criminal statutes with regularity. For instance, Congress approved amendments to the Lanham Act allowing civil actions against trademark racketeers for treble damages "in the case of any violation of section 32(1)(a) of this Act . . ." 18 U.S.C. § 2320 (1984).

II.

A REQUIREMENT OF "MOBSTER"-TYPE INJURY FOR A CIVIL RICO CLAIM IS AN IMPERMISSIBLE INFRINGEMENT ON LEGISLATIVE AUTHORITY.

Contrary to the plain language of § 1964(c), extensive legislative history, and the overwhelming weight of judicial authority, the court of appeals held that standing to sue civilly should be limited to instances where the plaintiff's injury is of the kind caused by "mobsters" who "through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors." (Pet. App. 27a).

A. The plain language of RICO does not require a "mobster"-type or other distinct injury in order for a civil plaintiff to have standing to sue.

In § 1964(c) Congress addressed the type of injury compensable under civil RICO. Congress provided that "*any person*" has standing to sue under civil RICO if that person has sustained an injury to business or property by reason of the commission of any of the activities prohibited by § 1962. (Emphasis supplied.) In ruling as it did, the court of appeals redrafted § 1964(c) to add, in effect, that only a person suffering from an injury to his business or property by reason of the commission of an activity prohibited by § 1962 *of the type caused by mobsters or organized crime,* may sue for threefold damages and attorneys' fees. "[T]he short answer is that Congress did not write the statute that way." *Russello v. United States,* 104 S. Ct. 296, 300 (1983) (quoting *United States v. Naftalin,* 441 U.S. 768, 773 (1979)).

RICO does not require special injury for it does not state that the injury has to be of the type caused by "mobsters" or

the undefined entity known as organized crime. It does not even mention these concepts. Section 1962 only speaks of an injury that is the result of a "pattern of racketeering activity." "Racketeering activity" is defined in § 1961(1) simply as the commission of any of the listed acts.

Not surprisingly, the "mobster"-type injury limitation was dredged up by the court of appeals through inference. According to the court of appeals it is to be implied from the words "by reason of" which are contained in § 1964(c).

The court of appeals' attempts to justify this interpretation of the RICO statute by referring to what it perceives the meaning of those words to be under Section 4 of the Clayton Act. Since the "by reason of" language was construed in *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1977), "to require plaintiffs to allege and prove an 'antitrust injury,'" or an " 'injury of the type the antitrust laws were intended to prevent,' " the majority reasoned that the same phrase in the RICO statute was intended as a limitation on standing (Pet. App. 24a-25a). The court of appeals concluded that standing was conferred only on those who could show that they were harmed by a "racketeering injury." (Pet. App. 25a).

Sedima submits that it has sustained a racketeering injury, i.e., an injury arising out of the operation of an enterprise through a pattern of racketeering. "As we read this 'by reason of' language, it simply imposes a proximate cause requirement on plaintiffs." *Haroco v. Am. Nat'l Bank & Trust Co. of Chicago,* 747 F.2d 384, 398 (7th Cir. 1984).

Concluding that the purpose of RICO is to fight mobsters, the majority in *Sedima* held that the injury must be of a kind caused "by mobsters." However, defining injury of a kind caused "by mobsters" was elusive. The *Sedima* majority never explained

how a "mobster"-type injury is different from an injury caused by the conduct of an enterprise "through a pattern of racketeering." As has been stated by the Seventh Circuit: "The initial hurdle for proponents of the racketeering injury is merely to define it, for 'a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it' . . . ." *Haroco,* 747 F.2d at 389 (quoting *Alexander Grant & Co. v. Tiffany Indus.,* 742 F.2d 408, 413 (8th Cir. 1984)).

Sedima's imprecision led ineluctably to confusion even among panels in the Second Circuit. For instance in *Bankers Trust v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), the majority furnished examples of "racketeering enterprise injury." The first illustration is that of an arson victim who subsequently loses his fire insurance because of escalating premiums and then suffers accidental fire damage that goes unreimbursed. The second involved a businessman forced to take on an unwanted partner because an enterprise feloniously caused its customers to withhold their business. "The examples, far from clarifying the racketeering injury requirement, underscore the difficulty of defining its contours." *Bankers Trust,* 741 F.2d at 522 (Cardamone dissenting). They suggest by their facts that direct injuries flowing from predicate acts of a RICO defendant would not be subject to treble damage recovery. As Circuit Judge Cardamone concluded in exasperation: "Stated another way, even a convicted Mafia defendant could escape civil liability for the harm done his intended victim under the majority's reasoning." *Id.*

The central difficulty with the court of appeals' analogy to the antitrust law is that antitrust and RICO do not share a common purpose. The antitrust laws were designed to promote competition, whereas RICO was designed to eradicate organized criminal activity. This dichotomy was put well in *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983):

> [A]nalogies to limitations on standing in the antitrust context are entirely inappropriate here. The antitrust laws are designed to promote competition in the marketplace . . . .
>
> RICO has the opposite purpose. It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have no applicability here. *See Schact v. Brown, supra* at 1357-58.

(Emphasis in original.)

The purpose for an "antitrust injury" requirement is to distinguish between proper and improper parties. Because of the purpose of RICO, there is no similar or parallel need to winnow claims. A racketeering injury requirement only serves to preclude suit by those intended as proper parties under the plain language of the statute.

The two most popular standing requirements which have been imposed are the "competitive injury" and "racketeering enterprise injury" limitations. The competitive injury requirement is just a transplant of the competitive injury requirement under the antitrust statutes, *see, e.g., Brunswick,* 429 U.S. at 487-89; *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962), to the civil RICO content. *See Bankers Trust Co. v. Feldesman,* 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (1984); *North Barrington Dev. v. Fanslow,* 547 F. Supp. 207 (N.D. Ill. 1980); *Van Schaick v. Church of Scientology of California,* 535 F. Supp. 1125 (D. Mass. 1982); *Erlbaum v. Erlbaum,* 584 F. Supp. 908 (E.D. Pa. 1982); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206 (E.D. Mich. 1981).

The competitive injury requirement would not grant a remedy "to those who have suffered *directly* from the operation of a business 'through a pattern of racketeering,' but only to those injured as competitors." *Schacht v. Brown,* 711 F.2d 1343, 1357 (7th Cir. 1983), *cert. denied sub nom. Arthur Anderson & Co. v. Schacht,* 104 S. Ct. 508 (1983) (emphasis in original).

The majority of courts have either rejected the requirement,[13] or abandoned it in favor of another approach.[14]

13. *See, e.g., Bunker Ramo Corp. v. United Business Forms,* 713 F.2d 1272, 1288 (7th Cir. 1983); *Schacht,* 711 F.2d at 1358; *Bennett v. Berg,* 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd en banc,* 710 F.2d 1361 (8th Cir. 1983), *cert. denied sub nom. Prudential Ins. Co. v. Bennett,* 104 S. Ct. 527 (1983); *Yancoski v. E.F. Hutton & Co.,* 581 F. Supp 88, 95 (E.D. Pa. 1983); *Slattery v. Costello,* 586 F. Supp 162, at 165-66 (D.C. Cir. 1983); *In re Catanella & E.F. Hutton & Co.,* 583 F. Supp. 1388, 1430 (E.D. Pa. 1984); *Municipality of Anchorage v. Hitachi Cable,* 547 F. Supp. 633 (D. Alaska 1983); *In re Longhorn Securities Litigation,* 573 F. Supp. 255, 270 (W.D. Okl. 1983); *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Wilkinson v. Paine, Webber, Jackson & Curtis,* 585 F. Supp. 23 (N.D. Ga. 1983); *Mauriber v. Shearson/American Express,* 556 F. Supp. 1231 1140-41 (S.D.N.Y. 1983); *Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Gitterman v. Vitoulis,* 564 F. Supp. 46, 48 (S.D.N.Y. 1982); *Crocker Nat'l Bank v. Rockwell Intern. Corp.,* 555 F. Supp 47, 49 (N.D. Cal. 1982); *D'Iorio v. Adonizio,* 554 F. Supp. 222, 230 n.5 (M.D. Pa. 1982); *Hanna Mining Co. v. Noreen Energy Resources,* 574 F. Supp. 1172 (N.D. Ohio 1982); *State Farm Fire and Cas. Co. v. Estate of Caton,* 540 F. Supp. 673, 680 (D. Del. 1982); *Hellenic Lines v. O'Hearn,* 523 F. Supp. 244, 248 (S.D.N.Y. 1981).

14. *See, e.g., In re Action Industries Tender Offer,* 572 F. Supp. 846, 851-52 (E.D. Va. 1983) (racketeering injury); *Guerrero v. Katzen,* 571 F. Supp. 714, 720 n.6 (RICO injury); *Barker v. Underwriters at Lloyd's, London,* 564 F. Supp. 352, 358 (E.D. Mich. 1983) (racketeer enterprise injury); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (racketeer enterprise injury).

It is far from clear how "racketeering enterprise injury" differs from a "competitive injury." Those courts that have recognized that "competitive injury" is a different kettle of fish, but still want to narrow RICO's scope, have imposed a "racketeering enterprise injury" requirement.[15] None of these courts, however, have defined the concept of a "racketeering enterprise injury" or its parameters. More telling, no court has found it to exist. As with the "competitive injury" requirement, the majority of courts have rejected a "racketeering enterprise injury" limitation.[16]

15. *See Margolis v. Republic National Bank,* 585 F. Supp. 595, 597 (S.D.N.Y. 1984); *Bruns v. Ledbetter,* 583 F. Supp. 1050, 1056 (S.D. Cal. 1984); *Furman v. Cirrito,* 578 F. Supp. 1535, 1539-41 (S.D.N.Y. 1984), *aff'd,* 741 F.2d 524 (2d Cir. 1984); *Hudson v. Larouche,* 579 F. Supp. 623, 630 (S.D.N.Y. 1983); *Haroco v. American National Bank & Trust Co. of Chicago,* 577 F. Supp. 111, 114-15 (N.D. Ill. 1983); *Dakis v. Chapman,* 574 F. Supp. 757, 761 (N.D. Cal. 1983); *Richardson v. Shearson/American Express Co.,* 573 F. Supp. 133, 137 (S.D.N.Y. 1983); *In re Action Industries Tender Offer,* 572 F. Supp. 846, 852 (E.D. Va. 1983); *Bankers Trust Co. v. Feldesman,* 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984); *Barker v. Underwriters at Lloyd's, London,* 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Harper v. New Japan Securities Int'l,* 545 F. Supp. 1002, 1006-08 (C.D. Cal. 1982); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

16. *See, e.g., Minpeco S.A. v. Conticommodity Services,* 552 F. Supp. 327 (S.D.N.Y. 1984); *Estee Lauder v. Harco Graphics,* 558 F. Supp. 83 (S.D.N.Y. 1984); *Wilcos v. Ho-Wing Sit,* 586 F. Supp. 561, 568-69 (N.D. Cal. 1984); *In re Catanella & E.F. Hutton & Co.,* 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984); *Laterza v. American Broadcasting Co.,* 581 F. Supp. 408, 414 (S.D.N.Y., 1984); *Charing Cross. v. Riggs Nat'l Bank,* 655 F.2d 1257 (D.D.C. 1983); *Slattery v. Costello,* 586 F. Supp. 162, 167 (D.D.C. 1983); *Yancoski v. E.F. Hutton & Co.,* 581 F. Supp. 88, 96 & n.19 (E.D. Pa. 1983); *Kirschner v. Cable/Tel. Corp.,* 576 F. Supp. 234 (E.D. Pa, 1983); *In re Longhorn Securities Litigation,* 573 F. Supp. 255, 269-70 (W.D. Okla. 1983); *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Mauriber v. Shearson/American Express,* 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.,* 567 F. Supp. 1146, 1156-57 (D.N.J. 1983), *aff'd*

(Cont'd)

RICO is not aimed at "racketeers"; the word racketeer is not used in the statute except in its title. Instead, it is aimed at "racketeering"[17] and even then only in the context of "racketeering activity," *i.e.*, organized criminal activity which Congress has defined carefully and precisely in terms of conduct. When Congress decided on severe sanctions both civil and criminal for the affairs of an "enterprise" through a "pattern of racketeering activity" it did not except businessmen like the Armons, or closely-held corporations like Imrex. "[I]t appears that *Sedima* has revived the discredited 'organized crime nexus' requirement without quite saying so." *Haroco*, 747 F.2d at 394. "If the conduct of such people can sometimes fairly be characterized as 'garden variety fraud', we can only conclude that by the RICO statute congress has provided an additional means to weed that 'garden' of its fraud." *Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984).

(Cont'd)

in part and rev'd in part, both on other grounds, 742 F.2d 786 (3d Cir. 1984); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Windsor Associates v. Greenfeld*, 564 F. Supp. 273, 278-79 (D. Md. 1983).

17. Murrary I. Gurfein has explored the etymology of the term:

> Racketeering, a term loosely applied to a variety of criminal schemes has not yet received exact legal definition . . . . It . . . applies to the operation of an illegal business as well as to the illegal operation of a legal business . . . . The word gained currency in the 1920s, but its origin remains obscure . . . . [T]he most plausible [theory notes that the] word racket has long been used to describe a loud noise and hence a spree or party or "good time." In the 1890s social clubs of young men in New York City, under the auspices of political leaders, gave affairs called rackets; since among their number there were members of neighborhood gangs, it was found easy to coerce local tradesman to buy tickets.

Organized Crime in America 181-82 (G. Tyler ed. 1962).

Every circuit court that has considered the issue has refused to read into § 1964(c) any sort of organized crime limitation.[18] The Seventh Circuit aptly noted: "having already rejected the 'organized crime' limitation . . . this court does not wish that limitation to be revived under the guise of determining the kinds of activity covered by RICO." *Schacht v. Brown*, 711 F.2d at 1356. Most recently, the Eighth Circuit flatly rejected the Second Circuit's mobster-type injury requirement as "contrary to our holding in *Bennett*." *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 108 (1984).

The creation of a mobster-type injury standing requirement is therefore indefensible on any ground.

B. RICO's legislative intent clearly supports civil suits unfettered by a person's status or affiliation.

The court of appeals was incorrect when it stated that "there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the 'by reason of' language." (Pet. App. 27a) (emphasis

18. *See, e.g., Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160, 1167 (5th Cir. 1984); *Sutliff v. Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984); *Owl Construction Co. v. Ronald Adams Contractor*, 727 F.2d 540, 542 (5th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3098 (U.S. June 11, 1984) (No. 83-2042); *Bunker Ramo Corp. v. United Business Forms*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1343, 1356 (7th Cir. 1983), *cert. denied sub nom. Arthur Anderson Co. v. Schacht*, 104 S. Ct. 508, 509 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd*, 710 F.2d 1361 (8th Cir. 1983) *(en banc), cert. denied sub nom. Prudential Ins. Co. v. Bennett*, 104 S. Ct. 527 (1984). This Court, too, has refused to limit other federal statutes which, like RICO, were passed to deal with aspects of organized crime. *See, e.g., United States v. Culbert*, 435 U.S. 371, 374 (1978) (18 U.S.C. § 1951 (1946); extortion); *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966) (18 U.S.C. § 1953 (1961); lottery tickets).

in original). On the contrary, the legislative history indicates that Congress was well aware of the expansiveness of RICO's application,[19] but was adamant that the fight against organized crime not be impeded by an overly narrow definition of actionable conduct, or standing requirements.

RICO legislation was first introduced in 1967 in both Houses of Congress. The bills were studied by the American Bar Association, which issued a report in 1969. The ABA endorsed the concepts of the bills, but recommended these concepts be drafted outside the antitrust statutes, so that they might have a broader impact. The report expressed particular concern that use of the antitrust laws would create,

> inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. *Such a private litigant*

19. As Representative Mikva noted in House debate,

> My objection to the bill in toto is whatever its motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kind of horribles of overreach . . . under the definition if five or more of [my colleagues] engage in . . . a game of poker and it lasts past midnight . . . thus continuing for a period of two days, then [they] have been running an organized gambling business and [they] can get 20 years, and the Federal Government can grab off the pot besides.

116 Cong. Rec. at 35,204 ('970).

Similar objections were voiced by civil liberties groups, fearing overbroad application. *See Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, before the Subcommittee on Criminal Laws and Procedure of the Senate Conmittee on the Judiciary,* 91st Cong., 1st Sess. 475 (1969).

> *would have to contend with a body of precedent — appropriate in a purely antitrust context — setting strict requirements on questions such as "standing to sue" and "proximate cause."*

115 Cong. Rec. 6994, 6995 (1969) (emphasis added). The ABA's recommendation that RICO legislation be separated from the antitrust laws was, of course, adopted, as the court of appeals acknowledges in its opinion (Pet. App. 14a). Accordingly, any suggestion that RICO actions be limited by antitrust-type limitations is anomalous to the very considerations that led to originally separating RICO from the antitrust statutes.

In Senate hearings in 1969, the American Civil Liberties Union objected to the breadth of RICO, commenting that it would be "applicable in areas far removed from that which we traditionally define as organized crime." *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 . . . Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 475 (1969). It recommended that RICO be redrafted to "confine its reach to [the] limited aim" of restricting illegitimate investment. *Id.* In addition, Senators Philip A. Hart and Edward M. Kennedy filed individual reports on S. 30, which reflected the view of the ACLU, expressing concern that "the reach of [the] . . . bill . . . [went] beyond organized criminal activity." S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969). The Senators thought that if RICO were amended "to restrict its scope solely to organized criminal activity," it would contribute "important and useful means of eradicating organized crime." *Id.*

In addition, at the House hearings on Title IX, the Association of the Bar of the City of New York objected to the scope of the bill as reaching beyond what has traditionally been considered "organized crime." 91st Cong., 2d Sess. 294 (1970). Senator

McClellan, one of the bill's principal sponsors, responded that such a concern "confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination." 116 Cong. Rec. 18,913 (1970). Senator McClellan further observed that the predicate offenses "are characteristic of organized crime. [They] lend themselves to organized commercial exploitation . . . *It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.*" 116 Cong. Rec. at 18,940 (emphasis added). Senator McClellan also observed, "Of course, it is true that Title IX will have some application to individuals who are not themselves members of La Cosa Nostra or otherwise engaged in organized crime. However, that is not a reason to cut back its scope . . . ." 116 Cong. Rec. at 18,945.[20]

Congressman Biaggi proposed an amendment that sought to limit the application of RICO to Mafia and La Cosa Nostra organizations. 116 Cong. Rec. at 35,343. The amendment was vigorously attacked on constitutional grounds. House Judiciary Chairman Celler objected that such terms were "imprecise, uncertain and unclear," 116 Cong. Rec. at 35,343, and that mere membership in an organization should not be punished. 116 Cong. Rec. at 35,343-44. Congressman Poff, a sponsor of the bill, objected that such an amendment might violate this Court's rulings that struck down statutes which created status offenses, such as *Scales v. United States,* 367 U.S. 203 (1961), and *Robinson v.*

20. Later, in a law review article, Senator McClellan noted that "the Senate report does not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that these offenses are characteristic of organized crime." McClellan, *The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?,* 46 Notre Dame L. Rev. 55, 142 (1970).

California, 370 U.S. 660 (1962). 116 Cong. Rec. at 35,344. Congressman Poff also defended the broad reach of the act by noting,

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime — as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344. Earlier, Congressman Poff responded to critics by stating:

> Precedents as contained in numerous court decisions were reviewed and weighed — and every effort was made to produce a strong and effective tool with which to combat organized crime — and at the same time deal fairly with *all* who might be affected by this legislation — whether part of the crime syndicate or not.

116 Cong. Rec. at 35,205 (1970) (emphasis added). The amendment was rejected by Congress. 116 Cong. Rec. at 35,346.

Also during the House debates, it should be noted, Congressmen William F. Ryan, John Conyers, Jr., and Abner J. Mikva, like Senators Hart and Kennedy, objected to RICO as it was "a tool to be employed for all." H. R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970). They noted that it did not "make [a] discrete segregation of mobsters"; and the treble damage action "provide[d] invitation for disgruntled and malicious competitors

to harass innocent businessmen engaged in interstate commerce." *Id.* Finally, their plea that RICO "should not be adopted," *Id.* at 189, of course, was not accepted, and RICO became law.

What must be concluded from the legislative history is that if a "mobster"-type or "organized crime" type or "racketeering" injury limitation were read into the statute, it would be an amendment that the elected representatives specifically declined to adopt.

C. "Mobster"-type injury requirement — an unsound judicial engraftment.

In considering RICO, Congress recognized that fraud is a pervasive problem throughout our society, *see* Statement of Findings and Purpose, Organized Crime Control Act of 1970, 84 Stat. 922-23, *Civil Action, supra,* p. 12, at 245-48, which causes billions of dollars in economic loss each year.[21] It has been observed that "[w]hite collar crime is a low visibility, high impact factor in our society . . . Like common crime, [it] can have a serious influence on the social fabric, and on the

21. The most comprehensive study of fraud done in recent years was published in 1974 under the auspices of the Chamber of Commerce of the United States. The Chamber estimated the direct economic cost of fraud as follows:

		Billions of Dollars
1.	Bankruptcy Fraud	.08
2.	Bribery, Kickbacks and Payoffs	3.00
3.	Consumer Fraud	21.00
4.	Embezzlement	7.00
5.	Insurance Fraud	2.00
6.	Receiving Stolen Property	3.50
7.	Securities Theft and Fraud	4.00
8.	Credit Card and Check Fraud	1.10
9.	Computer Related Fraud	.10
	Total	41.78

(Cont'd)

freedom of commercial and interpersonal transactions." H. Edelhertz, *The Nature, Impact, and Prosecution of White Collar Crime* 6-7 (1970).

Although constrained by *Sedima,* Circuit Judge Pra. observed, albeit somewhat futilely:

> It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. As we view RICO, fraud by anyone, when furthered by multiple use of the mails, constitutes a "pattern of racketeering activity". And when that pattern is used to conduct the affairs of an "enterprise", Congress intended to provide the victims with the private civil RICO remedies of treble damages and attorney's fees for all injuries caused by the defendant's conduct.

Furman, 741 F.2d at 529.

Congress further acknowledged that existing state and federal law was not capable of dealing with this problem. *See United States v. Turkette,* 452 U.S. at 586. "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds

(Cont'd)

Given the inflation rate since 1974, it would not be unreasonable to estimate a figure twice that today. *See Hearings on the Department of State, Justice and Commerce, the Judiciary, and Related Agencies, Subcommittee on Appropriations, House of Representatives,* 96th Cong. 2d Sess. 17 (1980) (testimony of FBI Director William H. Webster) ($44 to 100 billion). There can be no more significant issue of government than that its contract procurements process be free from fraud.

actionable in federal treble damage proceedings — the price of eliminating all possible loopholes." *Sutliff v. Donovan Companies,* 727 F.2d at 654.

In order to deter and help eliminate fraud from interstate commerce, Congress included in its definition of predicate acts of racketeering activity not only criminal activity which had formerly been "within the police power of the State," thereby essentially federalizing certain state crimes *Turkette,* 452 U.S. at 586-87 (citing legislative history), but also common federal crimes such as mail fraud and wire fraud. Congress was well advised that in doing that, it was altering the balance between federal and state laws, elevating "garden variety" common law fraud claims to the status of federal offenses, and subjecting violators to enhanced criminal penalties and severe civil remedies. *Id.*

"In response to suggestions that the statute be more narrowly tailored to prevent unexpected applications, Congress clearly preferred breadth to precision." *Haroco,* 747 F.2d at 398. Since Congress had the power to do this, "the courts are without authority to restrict the application of the statute." *Turkette,* 452 U.S. at 586-87.

CONCLUSION

The judgement of the court of appeals affirming the dismissal of the amended complaint should be reversed.

Respectfully submitted,

FRANKLYN H. SNITOW
WILLIAM H. PAULEY, III
Attorneys for Petitioner
415 Madison Avenue
New York, New York 10017
(212) 486-9080

February 28, 1985